UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
OFFICE OF THE CHIEF ADMINISTRATIVE HEARING OFFICER

UNITED STATES OF AMERICA, Complainant,	)	8 U.S.C. § 1324a Proceeding
v.	)	OCAHO Case No. 99A00054
WSC PLUMBING, INC., Respondent.	)	Judge Robert L. Barton, Jr.

ORDER DENYING COMPLAINANT'S FIRST MOTION FOR LEAVE TO AMEND COMPLAINT

(*February 3, 2000*)

I. INTRODUCTION

On December 13, 1999, the United States of America (Complainant) filed a Motion for Leave to Amend Complaint in which it sought to add Craftsmen Plumbing, Inc. (Craftsmen) as a respondent on the ground that Craftsmen is the corporate successor to WSC Plumbing, Inc. (WSC), the already-named respondent. Both Craftsmen and WSC filed Memoranda in Opposition to the Motion, arguing that Complainant has failed to articulate a legal or factual basis for its assertion that Craftsmen is WSC's successor.

Under California law and the law of most other jurisdictions, proof of a transfer of assets from the putative predecessor to the putative successor is a prerequisite for any finding of successor liability. Complainant has failed to allege that assets were transferred from WSC to Craftsmen, and has failed to adduce any facts suggesting that such an asset transfer took place. Consequently, Complainant's Motion for Leave to Amend Complaint is DENIED without prejudice on the ground that the proposed amendment would be futile.

II. BACKGROUND AND PROCEDURAL HISTORY

On July 29, 1999, Complainant filed a Complaint with the Office of the Chief Administrative Hearing Officer (OCAHO) alleging that WSC had violated 8 U.S.C. § 1324a(a)(1)(B) by failing to comply with its employment eligibility verification obligations set forth at 8 U.S.C. § 1324a(b). In its prayer for relief, Complainant requests that I direct WSC to pay civil money penalties in the amount of $18,640.00. The Complaint shows that Complainant's investigation of WSC was initiated

on June 11, 1997, when an agent of the Immigration and Naturalization Service (INS) served a Notice of Inspection upon WSC, requiring the company to produce its I-9 forms for INS Inspection on June 20, 1997. C.'s Compl. "Allegations" at ¶¶ 3, 4, 17, 18. The Complaint also shows that on May 22, 1998, INS served a Notice of Intent to Fine on WSC, and WSC requested a hearing before the OCAHO. C.'s Compl. "Jurisdiction" at ¶ 2. On October 21, 1999, WSC filed an Answer to the Complaint.

A. COMPLAINANT'S MOTION FOR LEAVE TO AMEND COMPLAINT

On December 13, 1999, Complainant filed its First Motion for Leave to Amend Complaint (C.'s Mot. to Amend), along with a supporting memorandum of law (C.'s Memo.), and a draft amended Complaint (C.'s Draft Compl.). In its Motion, Complainant seeks to amend page one of the Complaint so that the designation of respondent is changed from "WSC Plumbing, Inc." to "WSC Plumbing, Inc., and its successor in interest, Craftsmen Plumbing, Inc." C.'s Memo. at 1; C.'s Draft Compl. at 1. Complainant seeks to add Craftsmen as a respondent on the theory that Craftsmen is a "mere continuation" of WSC, a status that ostensibly renders Craftsmen liable for the legal and financial obligations of WSC under the equitable concept of corporate successor liability. C.'s Memo. at 4. In support of its Motion, Complainant asserts (1) that Craftsmen occupies the same physical address that WSC formerly occupied, (2) that Craftsmen drew nearly its entire labor force from the former employees of WSC during the first quarter of 1998, (3) that the owners of Craftsmen are the parents of the owners of WSC, (4) that the owners of Craftsmen were former managerial employees of WSC ("Controller" in the case of William W. Combe and "Office Manager" in the case of Carmelita Combe), and (5) that Craftsmen and WSC both engage in the business of plumbing contractor. Id. at 3-4.

Complainant attaches to its Memorandum a number of documents obtained during discovery which purport to corroborate its assertions. Finally, Complainant cites United States v. Spring & Soon Fashion, Inc., 8 OCAHO 1003 (1998),[1] a decision in which I imposed successor liability against a company on the ground that it had admitted its status as a "mere continuation" of the principal respondent. Id. at 4. Complainant cites a wealth of authority from various U.S. Courts of Appeals with respect to the standards governing review of motions to amend, id. at 4, 5; however, Complainant cites no authority from the U.S. Court of Appeals for the Ninth Circuit (Ninth Circuit) or from the California state courts respecting the proper legal standards governing successor liability.

In a Prehearing Conference held on December 14, 1999, counsel for WSC requested thirty days to respond to Complainant's Motion to Amend, and Complainant objected. I overruled Complainant's objection and in a Prehearing Conference Report (PHCR) issued on December 15,

[1] I issued two published decisions in United States v. Spring & Soon Fashion, Inc. The first decision, published at 7 OCAHO 960 (Ref. No. 982) (1997), adjudicated Complainant's Motion to Amend and will hereafter be referred to as Spring & Soon I. The second decision, published at 8 OCAHO 1003 (1998), adjudicated the issue of successor liability and will hereafter be referred to as Spring & Soon II.

1999, held that WSC's response to the First Motion to Amend must be filed with my office by January 14, 2000. PHCR at 2.

B. CRAFTSMEN PLUMBING, INC.'S RESPONSE TO COMPLAINANT'S MOTION

On January 12, 2000, counsel for Craftsmen filed a Notice of Appearance and a Memorandum in Opposition to Complainant's First Motion for Leave to Amend Complaint (Craftsmen Opp. Memo.). Attached to Craftsmen's Memorandum are a Declaration of Carmelita Combe (C. Combe Dec.) and a Declaration of William W. Combe (W.W. Combe Dec.). These declarations, while sworn, are not notarized affidavits; consequently, they are mere assertions, they are not testimony or probative evidence. In both the Memorandum and the attached Declarations, Craftsmen and its owners seek to refute Complainant's assertion that Craftsmen is a "mere continuation" of WSC. Specifically, Craftsmen asserts that there is no "continuity of ownership" between WSC and Craftsmen. According to Craftsmen, WSC was owned by William S. Combe, Brian E. Combe and Alan C. Combe–the sons of William W. Combe and Carmelita Combe–while Craftsmen is actually owned by Carmelita Combe and William W. Combe. Craftsmen Opp. Memo. at 1; C. Combe Dec. at ¶¶ 6, 7; W.W. Combe Dec. at ¶¶ 6, 10. According to Craftsmen's Memorandum and the attached Declarations, William W. Combe and Carmelita Combe acted as sureties or guarantors on behalf of their sons during the formation of WSC, collateralizing a line of credit in excess of $300,000.00 in early 1991 and later making loans in excess of $100,000.00. Craftsmen Opp. Memo. at 2; C. Combe Dec. at ¶ 8; W.W. Combe Dec. at ¶ 11. However, William W. Combe and Carmelita Combe claim never to have possessed either ownership interests or managerial responsibilities with respect to WSC. C. Combe Dec. at ¶ 15; W.W. Combe Dec. at ¶ 15. Carmelita Combe claims that her role with respect to WSC was merely "to get them started and set up their office" and to perform "secretarial" and bookkeeping duties. C. Combe Dec. at ¶¶ 9, 10. Carmelita Combe further claims that she used the title "Office Manager" in response to several INS inquiries "only after being directed to do so by ... an INS agent." Craftsmen Opp. Memo. at 3; C. Combe Dec. at ¶ 14. I conclude that there is no evidence in the record to support Carmelita Combe's assertion that she was coerced into using the title "Office Manager" or that she believed the title "Office Manager" was a mischaracterization of her role with WSC. William W. Combe claims that his "primary role [with WSC] was as an advisor and concerned father" who "worked with [his] sons to help them learn the business end of being a plumbing contractor," W.W. Combe Dec. at ¶ 12, but who ceased to "draw any salary" or have "day to day responsibilities" after 1996. W.W. Combe Dec. at ¶ 14.

William W. Combe and Carmelita Combe assert that they are the sole shareholders and managers of Craftsmen, Craftsmen Opp. Memo. at 2; C. Combe Dec. at ¶ 3; W.W. Combe Dec. at ¶ 3, which they incorporated out of economic necessity on November 12, 1997, when the failure of WSC made it apparent to them that they "would lose the collateral [they] had put up for [their sons'] line of credit." Craftsmen Opp. Memo. at 2; C. Combe Dec. at ¶¶ 13, 16; W.W. Combe Dec. at ¶¶ 16, 18. A copy of Craftsmen's Articles of Incorporation, date-stamped November 12, 1997, by the Office of the Secretary of State of the State of California, is attached to Complainant's Motion for Leave to Amend Complaint. C.'s Memo. (attachment 10). William W. Combe and Carmelita Combe assert that none of their sons are "officers, directors, shareholders or owners" of Craftsmen,

C. Combe Dec. at ¶ 17; W.W. Combe Dec. at ¶ 23, and that Craftsmen "did not retain or in any way use any of the assets of WSC." Craftsmen Opp. Memo. at 4; W.W. Combe Dec. at ¶ 21. This last assertion–relating to the lack of any asset transfer between WSC and Craftsmen–is consistent with WSC's responses to Complainant's discovery requests. In response to Complainant's Interrogatory No. 14, which asked WSC to "describe any and all assets of any nature acquired, sold or transferred from WSC Plumbing, Inc. to Craftsmen Plumbing, Inc. at any time prior to or subsequent to the date on which WSC Plumbing, Inc. ceased doing business," WSC stated "[n]one; all assets held by UCC-1 filings by National Bank of Southern California." C.'s Memo. (attachment 11(a) at 5; attachment 11(b) at 2).

In addition to a lack of "continuity of ownership" between Craftsmen and WSC, Craftsmen and its owners seek to show that Craftsmen has not continued in the same line of business as WSC. Specifically, Craftsmen asserts that it

> is a much smaller company [than WSC] and currently employs only 25 persons. It specializes in the area of custom homes, apartments and condominiums (single site jobs), whereas, WSC worked on large housing tracts for several homebuilders. It should be noted that [Craftsmen] does not do work for any of the former customers of WSC.

Craftsmen Opp. Memo. at 4.

Craftsmen concedes that it occupies the same physical location formerly occupied by WSC, Craftsmen Opp. Memo. at 4; W.W. Combe Dec. at ¶ 20, although it emphasizes that it leased the premises independently and did not assume WSC's prior lease of the premises. Craftsmen Opp. Memo. at 4. Craftsmen also "concedes that most of its employees are former employees of WSC" and that Craftsmen "recruited employees from WSC employment lists." Craftsmen Opp. Memo. at 3; W.W. Combe Dec. at ¶ 19. However, William W. Combe asserts that "Craftsmen currently employees 25 persons, of those only 15 (including family members) are former WSC employees." W.W. Combe Dec. at ¶ 19. This claim, even if true, does not contradict Complainant's assertion that in early 1998–the months immediately following the demise of WSC and the incorporation of Craftsmen–twenty-two of Craftsmen's twenty-three employees were former WSC employees. C.'s Memo. at 2-3.

C. WSC PLUMBING, INC.'S RESPONSE TO COMPLAINANT'S MOTION

On January 14, 2000, WSC filed a Memorandum in Opposition to Complainant's Motion to Amend Complaint (WSC Opp. Memo.). Initially, WSC's Memorandum incorporates by reference the claims made in Craftsmen's Memorandum, WSC Opp. Memo. at 1, and essentially recapitulates Craftsmen's arguments against successor liability. However, unlike Craftsmen, WSC also suggests that Complainant has engaged in undue delay and, perhaps, bad faith in filing the present Motion.

Specifically, WSC alleges that Complainant's real motive in filing the present Motion is "to exert additional settlement pressure by unreasonably increasing the costs of this litigation." Id. at 2.

III. STANDARD OF REVIEW FOR MOTION TO AMEND COMPLAINT

A. MOTIONS TO AMEND UNDER OCAHO REGULATIONS AND THE FEDERAL RULES

The OCAHO Rules of Practice and Procedure permit a complainant to amend a complaint "upon such conditions as are necessary to avoid prejudicing the public interest or the other party." See 28 C.F.R. § 68.9(e) (1999). This rule is analogous to and is modeled upon Rule 15(a) of the Federal Rules of Civil Procedure (FED. R. CIV. P.), and accordingly it is appropriate to look for guidance to the case law developed by the federal courts in determining whether to permit requested amendments under Rule 15(a). See United States v. Valenzuela, 1998 WL 745982, *2 (O.C.A.H.O.); United States v. Mr. Z Enterprises, 1 OCAHO 1128, 1129 (Ref. No. 162) (1990), 1990 WL 512154, *1 (O.C.A.H.O.)[2]; accord 28 C.F.R. § 68.1 (1999). Rule 15(a) provides that a party may amend his or her complaint once "as a matter of course" before a responsive pleading is served; after a responsive pleading is served the "party may amend the party's pleading only by leave of court or by written consent of the adverse party and leave shall be freely given when justice so requires." FED. R. CIV. P. 15(a) (1998); see also United States v. Webb, 655 F.2d 977, 979 (9th Cir. 1981). In the instant case, Complainant's Motion for Leave to Amend Complaint was filed after WSC had submitted its Answer; moreover, "the adverse part[ies]"–WSC and Craftsmen–have not consented to the amendment. Consequently, any amendment of the Complaint must be made "by leave of court."

B. MOTIONS TO AMEND IN THE NINTH CIRCUIT

Because this action arose in the State of California, I follow the authoritative precedents of the Ninth Circuit where appropriate. In this instance it is appropriate to consult Ninth Circuit standards governing motions for leave to amend complaints. The dominant Ninth Circuit rule

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[2] Citations to OCAHO precedents in bound Volumes I and II, Administrative Decisions Under Employer Sanctions and Unfair Immigration-Related Employment Practice Laws of the United States, reflect consecutive decision and order reprints within those bound volumes. Citations to OCAHO precedents in bound Volumes III-VII, Administrative Decisions Under Employer Sanctions, Unfair Immigration-Related Employment Practices and Civil Penalty Document Fraud Laws of the United States, reflect consecutive decision and order reprints within those bound volumes. For OCAHO precedents appearing in bound volumes, pinpoint citations refer to specific pages in those volumes; however, pinpoint citations to OCAHO precedents in as yet unbound Volumes are to pages within the original issuances. Decisions that appear in Volumes I-VII will be cited to the page in that bound publication on which they first appear; the OCAHO reference number, by which all as yet unbound decisions are cited, also will be noted parenthetically for Volume I-VII decisions. Unbound decisions that have only been published on Westlaw shall be identified by Westlaw reference number.

governing Rule 15(a) motions appears in the case of DCD Programs, Ltd. v. Leighton, 833 F.2d 183, 186 (9th Cir. 1987), which continues to be cited as binding authority. See Bowles v. Reade, 198 F.3d 752, 757-58 (9th Cir. 1999); Royal Complainant. Co. of America v. Southwest Marine, 194 F.3d 1009, 1016 & n.9 (9th Cir. 1999).

According to Leighton, "'[r]ule 15's policy of favoring amendments to pleadings should be applied with extreme liberality,'" 833 F.2d at 186 (quoting Webb, 655 F.2d at 979), regardless of whether the amendment seeks to add parties or claims. 833 F.2d at 186. However, the Leighton court made clear that motions for leave to amend should not be granted automatically. Specifically, the court identified five factors relevant to determining the propriety of granting a motion for leave to amend: (1) bad faith by the movant; (2) undue delay; (3) prejudice to the party being added; (4) whether the plaintiff has previously amended the complaint; and (5) futility of the amendment. Id. & n.3. Of these five factors, bad faith, prejudice and futility appear most important. Indeed, undue delay appears to be mere evidence of prejudice or bad faith rather than an independent factor, and is therefore insufficient in itself to justify denying a motion to amend, Leighton, 833 F.2d at 187-88; similarly, recidivism in the filing of motions to amend–which the Leighton court raises in a footnote–seems to constitute a basis for denial of a motion to amend only insofar as it reflects bad faith on the part of the movant; it is not a dispositive factor in itself and is only "occasionally considered." Id. at n.3.

Rule 15(a)'s bias in favor of granting leave to amend is reflected in the Ninth Circuit's conclusion that a trial court's denial of a motion for leave to amend a complaint must be supported by "contemporaneous specific findings" either of prejudice, bad faith or futility. Id. at 186-87. Indeed, a trial court's failure to set forth such findings constitutes an abuse of discretion warranting reversal. Id. at 187.

IV. ANALYSIS

Applying the five Leighton factors to the facts of the instant case, I find that Complainant's Motion for Leave to Amend Complaint must be DENIED. My rationale for this conclusion is set forth below.

As discussed previously, Leighton requires that I consider five factors when determining the propriety of granting a motion for leave to amend: (1) bad faith by the movant; (2) undue delay; (3) prejudice to the party being added; (4) whether the plaintiff has previously amended the complaint; and (5) futility of the amendment. Leighton, 833 F.2d at 186 & n.3. The following discussion applies each of the five Leighton factors to the facts of the instant case.

A. BAD FAITH AND UNDUE DELAY BY THE MOVANT

In its Memorandum in Opposition to Complainant's First Motion for Leave to Amend Complaint, WSC implies that Complainant engaged in unjust delay before seeking to add Craftsmen as a respondent, and that this delay is evidence of bad faith. WSC Opp. Memo. at 1-2. Specifically,

WSC claims that Complainant was already aware of the connections between WSC and Craftsmen when the July 29, 1999, Complaint was filed; "[t]here is thus no good cause for failing to name Craftsmen earlier if it were truly a successor company." Id. WSC asserts that "[Complainant's] motion can only be explained as an attempt to exert additional settlement pressure by unreasonably increasing the costs of this litigation." Id. at 2.

No evidence exists in the record to suggest that Complainant has acted in bad faith in seeking to amend the Complaint. Only five months have elapsed between the filing of the original Complaint and the filing of the present motion–a not unreasonable span given that the pre-existing parties are still in the midst of discovery and have not yet been assigned a specific hearing date. Moreover, even if I agreed that Complainant had delayed in filing the present motion, the Ninth Circuit cautions that "delay alone is not sufficient to justify the denial of a motion requesting leave to amend." Leighton, 833 F.2d at 187. In the instant case, the lapse of time between the filing of the original Complaint and the present motion may have been motivated by legitimate considerations. Indeed, Complainant explained that the lapse was caused by its unsuccessful attempts during discovery to supplement its information about Craftsmen's relationship to WSC. C.'s Memo. at 6. Although Complainant "believes sufficient evidence exists to warrant the proposed amendment" even without such supplemental information, id., it was not unreasonable or unfair of Complainant to have sought stronger evidence to support its claim against Craftsmen. I find nothing in the record or elsewhere to support WSC's claim that Complainant has filed the present motion purely as a means of prompting settlement by increasing WSC's litigation costs.

B. PREJUDICE TO THE PARTY BEING ADDED

The Leighton court warns that "[a]mending a complaint to add a party poses an especially acute threat of prejudice to the entering party. Ergo, this court has stated, '[a]voiding prejudice to the party to be added thus becomes our major objective.'" Leighton, 833 F.2d at 187 (quoting Korn v. Royal Caribbean Cruise Line, Inc., 724 F.2d 1397, 1400 (9th Cir. 1984)). However, the court also warned that "[t]he party opposing amendment bears the burden of showing prejudice." Id. (citing Beeck v. Aqua-Slide 'N' Dive Corp., 562 F.2d 537, 540 (8th Cir. 1977)).

Of course, in some sense all respondents are prejudiced by the simple necessity of being compelled to defend themselves in a lawsuit. That is not the sort of prejudice Leighton seeks to prevent, however. Rather, "the party to be added"–Craftsmen in this instance–must demonstrate that it will suffer some peculiar prejudice if it is added as a respondent. In its Memorandum in Opposition to Complainant's Motion, Craftsmen never addresses the issue of prejudice. Instead, Craftsmen directs its efforts toward refuting the substantive merits of Complainant's claim that Craftsmen is the successor of WSC. Consequently, even if Craftsmen would be prejudiced by being made a respondent, Craftsmen has made no effort to satisfy its burden of proof on that point. In the absence of any evidence to the contrary, I conclude that Craftsmen would not be peculiarly prejudiced by being made a respondent in this case.

C. RECIDIVISM IN FILING MOTIONS TO AMEND

In a footnote, the Leighton court indicated that "a [trial] court's discretion over amendments is especially broad 'where the court has already given a plaintiff one or more opportunities to amend his complaint.'" Leighton, 833 F.2d at 186 n.3 (quoting Mir v. Frosburg, 646 F.2d 342, 347 (9th Cir. 1980)). The present motion is the first such motion filed by Complainant, thus the problem of recidivism does not arise here.

D. FUTILITY OF THE AMENDMENT

Leighton holds that "'futile amendments should not be permitted.'" Id. at 188 (quoting Klamath Lake Pharm. Assoc. v. Klamath Med. Serv. Bureau, 701 F.2d 1276, 1293 (9th Cir.), cert. denied, 464 U.S. 822 (1983)). Elaborating on this general principle, the Ninth Circuit held in Johnson v. American Airlines, Inc., 834 F.2d 721 (9th Cir. 1987), that "courts have discretion to deny leave to amend a complaint for 'futility,' and futility includes the inevitability of a claim's defeat on summary judgment." Id. at 724 (internal citations omitted); see also Gabrielson v. Montgomery Ward & Co., 785 F.2d 762, 766 (9th Cir. 1986) (affirming district court's denial of motion to amend on the ground that "any amendment would have been futile in that it could be defeated on a motion for summary judgment."); Herring v. Delta Air Lines, Inc., 894 F.2d 1020, 1024 (9th Cir. 1989), cert. denied, 494 U.S. 1016 (1990) (affirming district court's denial of leave to amend to add parties on the ground that "the addition of more plaintiffs would have been a futile act that would not have affected the issues underlying the grant of summary judgment."); ICR Graduate School v. Honig, 758 F. Supp. 1350, 1354 (S.D. Cal. 1991) (holding that "[l]eave to amend should not be granted where the amendment fails to allege facts which would support a theory of liability."); Campbell v. Commonwealth of Australia, 912 F.2d 468 (9th Cir. 1990), 1990 WL 124500, *4 (unpublished disposition) (upholding the district court's finding that "amendment [to add defendants] would have been futile because ... the joinder requirements of Fed. R. Civ. P. 20 were not met."). Thus, where the legal claims asserted against the proposed additional parties are clearly unsupported by relevant facts, the motion for leave to amend should be denied. As the Leighton court expressed it, "appellants should be granted leave to amend 'unless it appears beyond doubt' that appellants' ... amended complaint would ... be dismissed for failure to state a claim...." Leighton, 833 F.2d at 188 (citations omitted).

1. Permissive Joinder Under Federal Rule 20(a)

The unpublished Campbell opinion, referenced above, indicates that trial courts within the Ninth Circuit consider Rule 20(a) issues within the context of the broader Rule 15(a) analysis. Thus, if it appears that the new defendant could not properly be joined under the permissive joinder standard of Rule 20, the motion to amend should be denied on the ground of futility. Tracking the language of Rule 20, the Ninth Circuit holds that "two specific requisites [exist] for the joinder of parties: (1) a right to relief must be asserted by, or against, each plaintiff or defendant relating to or arising out of the same transaction or occurrence; and (2) some question of law or fact common to all the parties will arise in the action." League to Save Lake Tahoe v. Tahoe Regional Planning Agency, 558 F.2d

914 (9th Cir. 1977); see also Coughlin v. Rogers, 130 F.3d 1348, 1351 (9th Cir. 1997). Some courts hold that the movant's responsibility to assert a "right to relief" against all defendants under the first prong of the Rule 20(a) standard requires the trial court to make a preliminary determination as to the legal legitimacy of the claims asserted against each defendant. See, e.g., Intercon Research Assocs. Ltd. v. Dresser Industries, Inc., 696 F.2d 53, 58 (7th Cir. 1982) (holding that "Rule 20(a) was designed to allow a plaintiff to join only those parties against whom the plaintiff has a legitimate claim."); USX Corp. v. Adriatic Complainant. Co., 64 F. Supp.2d 469, 476 (W.D. Penn. 1998) (holding that "the prerequisite for invoking Rule 20 is the ability to demonstrate some right of relief against the party to be joined."). However, the Ninth Circuit has not embraced such a rule; instead, as detailed above, the Ninth Circuit treats the ability of the moving party to state a valid claim against the joined party as a separate requirement within the larger "futility" analysis.

In the instant case, Complainant's claims against WSC and Craftsmen are identical. Indeed, the Complainant's Motion for Leave to Amend Complaint seeks to add no new claims; instead, Complainant believes that Craftsmen's status as the corporate successor of WSC renders Craftsmen vicariously liable for WSC's violations of 8 U.S.C. § 1324a. Thus, Complainant has asserted a right to relief against both WSC and Craftsmen "arising out of the same transaction or occurrence"–WSC's failure to comply with the employment eligibility verification requirements of § 1324a. Similarly, if Craftsmen is joined as a respondent, "questions of law and fact common to all the parties will arise." Specifically, the liability of both WSC and Craftsmen will depend upon Complainant's ability to adduce facts showing that WSC violated § 1324a. Although the liability of Craftsmen will undoubtedly depend upon certain factors not relevant to WSC's liability–i.e., whether Craftsmen qualifies as a successor corporation–it is not necessary that every question of law and fact be common to all parties. As long as "any questions of law and fact" will be relevant to both WSC and Craftsmen, the second prong of the Rule 20(a) standard is satisfied. FED. R. CIV. P. 20(a) (1998). In conclusion, the addition of Craftsmen as a respondent satisfies the permissive joinder requirements of Rule 20(a).

2. Craftsmen as a "Mere Continuation" of WSC

Complainant concedes that as a general rule, a successor corporation is not responsible for the debts and liabilities of its predecessor. C.'s Memo. at 4. Complainant nonetheless believes that the facts of the instant case justify a deviation from this general rule. Id. Moreover, Complainant cites my prior decision in Spring & Soon II as support for its contention that Craftsmen is a "mere continuation" of WSC. Id.

As a threshold matter, there is some question as to whether I should adopt applicable state law regarding successor liability as a rule of decision in this case, or whether the circumstances justify the invocation of a federal common law rule of successor liability. For most purposes this question is purely academic because the traditional state law rules governing successor liability are functionally identical to the Ninth Circuit's "common law" rule. See Atchison, Topeka & Santa Fe Railway Co. v. Brown & Bryant, Inc., 159 F.3d 358, 364 (9th Cir. 1998) (holding that "we need not determine whether [California] law dictates the parameters of successor liability under CERCLA, as we would

reach the same result under federal common law."). However, to the extent that the federal common law of successor liability does not provide a rule of decision for this case, I will apply appropriate California law unless doing so would create a "significant conflict" between state law and the federal policy underlying § 1324a. O'Melveny & Myers v. FDIC, 512 U.S. 79, 87 (1994). 8 U.S.C. § 1324a provides a mechanism for holding employers liable for the hiring and continued employment of persons who lack employment authorization. In addition, that section provides a mechanism for enforcing compliance with employment eligibility verification procedures. There is no evidence that the application of state corporation law will frustrate these objectives.

In California, as in most other federal and state jurisdictions,

> [t]he usual rule of successor liability ... is that 'a corporation purchasing the principal assets of another corporation assumes the other's liabilities' only if '(1) there is an express or implied agreement of assumption, (2) the transaction amounts to a consolidation or merger of the two corporations, (3) the purchasing corporation is a mere continuation of the seller, or (4) the transfer of assets to the purchaser is for the fraudulent purpose of escaping liability for the seller's debts.'

Maloney v. American Pharm. Co., 255 Cal. Rptr. 1, 4 (Cal. Ct. App. 1988) (quoting Ray v. Alad Corp., 136 Cal. Rptr. 574, 560 (Cal. 1977)); see also Petrini v. Mohasco Corp., 71 Cal. Rptr. 2d 910, 912 (Cal. Ct. App. 1998); Acheson v. Falstaff Brewing Corp., 523 F.2d 1327, 1330 (9th Cir. 1975) (applying California law). In the present case, Complainant alleges that the third exception–the so-called "mere continuation" doctrine–applies to the facts of the present case, and justifies the addition of Craftsmen as a respondent. C.'s Memo. at 4.

The California Supreme Court has assumed, as a matter of course, that successor liability under the "mere continuation" exception exists only where there has been an asset transfer between the putative predecessor and the putative successor. Beatrice Co. v. State Bd. of Equalization, 863 P.2d 683, 690 (Cal. 1993) (en banc). Under California law a business may be held liable as a corporate successor only if its is "acquiring the assets of another corporation." Id. Moreover, the California Court of Appeals has indicated in dicta that "a mere continuation contemplates a direct sale of assets from the predecessor corporation to the successor corporation...," Maloney, 255 Cal. Rptr. at 4, and the Ninth Circuit has held quite explicitly that California's mere continuation rule "is applicable only where all or substantially all of a corporation's assets are purchased," and is inapplicable where "items such as receivables, trade name, and good will were not purchased" by the putative successor. See Acheson v. Falstaff Brewing Corp., 523 F.2d 1327, 1329-30 (9th Cir. 1975) (Kennedy, J.) (applying California law).

Neither Complainant's proposed amended Complaint nor its Motion for Leave to Amend Complaint adduce facts tending to show that any assets were transferred from WSC to Craftsmen. In fact, the only relevant evidence presently in the record tends to show that no asset transfer

occurred. In response to Complainant's Interrogatory No. 14, which asked WSC to "describe any and all assets of any nature acquired, sold or transferred from WSC Plumbing, Inc. to Craftsmen Plumbing, Inc. at any time prior to or subsequent to the date on which WSC Plumbing, Inc. ceased doing business," WSC replied: "[n]one; all assets held by UCC-1 filings by National Bank of Southern California." C.'s Memo. (attachment 11(a) at 5; attachment 11(b) at 2). Moreover, despite the fact that the assertions of Craftsmen and William W. Combe are unsupported by affidavits, both Craftsmen's Memorandum in Opposition to Complainant's Motion and William W. Combe's attached declaration emphasize that no assets were transferred from WSC to Craftsmen. Craftsmen Opp. Memo. at 4; W.W. Combe Dec. at ¶ 21. Thus, given the failure of Complainant to allege facts essential to a finding of successor liability against Craftsmen, "'it appears beyond doubt' that appellants' ... amended complaint would ... be dismissed for failure to state a claim...." Leighton, 833 F.2d at 188.

E. *SPRING & S*OON DISTINGUISHED

As previously mentioned, Complainant cites my prior decision in United States v. Spring & Soon Fashion, Inc., et al., 8 OCAHO 1003 (1998) (Spring & Soon II), as support for its Motion. C.'s Memo. at 4. For a number of reasons, Spring & Soon is inapposite to the circumstances of the instant case. First, because the respondents were located in, and the operative acts, arose in the State of New York, the authoritative precedents of the U.S. Court of Appeals for the Second Circuit (Second Circuit) controlled that case. By contrast, the facts of the instant case arose in the State of California, which is within the territorial jurisdiction of the U.S. Court of Appeals for the Ninth Circuit. The Second Circuit case law that guided my analysis in the Spring & Soon decisions simply has no application to the facts of a case arising in a different jurisdiction. Second, in responding to the Complainant's Motion to Amend, the respondent in Spring & Soon I never contested the Complainant's implicit assertion that a transfer of assets had occurred. Indeed, in Spring & Soon II the principal respondents admitted that the putative successor (Y Plus) had acquired all or most of the assets of the putative predecessor (Spring & Soon) and that Y Plus paid little or nor consideration for this transfer. Spring & Soon II, 8 OCAHO 1003, at 19. In the instant case, by contrast, both WSC and Craftsmen deny that WSC transferred any assets to Craftsmen. See Craftsmen Opp. Memo. at 4; W.W. Combe Dec. at ¶ 21; C.'s Memo. (attachment 11(a) at 5; attachment 11(b) at 2).

Third, and most importantly, the nature of the amendment sought by Complainant in Spring & Soon I, coupled with the factual arguments offered in support of that amendment, show that Complainant in Spring & Soon was attempting, through the language of successor liability, to show that Spring & Spring and Y Plus were "alter egos"–i.e., that Spring & Soon was "doing business as" Y Plus. Specifically, the amended complaint in the Spring & Soon case did not refer to Y Plus as the successor in interest of Spring & Soon; rather, both the caption of the amended complaint and the paragraph in the amended complaint referring to the respondents merely changed the name of the respondent from "Spring & Soon Fashion, Inc." to "Spring & Soon Fashion, Inc. d/b/a Y Plus S Corporation d/b/a Y Prus S Corporation." In the instant case, by contrast, the proposed amendment seeks to add Craftsmen as WSC's "successor in interest." This is a crucial difference,

and highlights the dangers inherent in attempting to fit the square peg of corporate successor theory into the round hole of the alter ego doctrine.

Corporate successorship focuses on broad principles of distributive fairness and requires no showing of bad faith by the party upon which liability is imposed. Indeed, in the context of strict products liability cases, successor liability may even be imposed upon a party that has acted without fault. This is so because successorship is a theory of indirect vicarious liability–akin to the common law concept of *respondeat superior*–and is based upon the premise that the inevitable social costs associated with large-scale economic activity should be imposed upon those parties who are in the superior position to bear or insure against such costs. The alter ego doctrine, by contrast, is most often imposed in the context of closely-held corporations and alleges direct liability (not vicarious liability) against a person or corporation under circumstances where the "observance of the fiction of separate [corporate] existence would under the circumstances sanction a fraud or promote injustice." See Hennessey's Tavern v. American Air Filter Co., Inc., 251 Cal. Rptr. 859, 862-63 (Cal. Ct. App. 1988) (quoting Marr v. Postal Union Life Ins. Co., 105 P.2d 649 (Cal Ct. App. 1940)). When a corporation attempts to avoid its liabilities by merely changing its name or its nominal ownership, California courts have long invoked the alter ego doctrine, not the doctrine of successor liability, to allow the complaining party to amend its complaint "not [to] add a new defendant to the judgment, but merely [to] set forth the correct name of the real defendant." Mirabito v. San Francisco Dairy Co., 47 P.2d 530, 531 (Cal. Ct. App. 1935); see also Thomson v. L.C. Roney & Co., 246 P.2d 1017, 1020-21 (Cal. Ct. App. 1952). In Spring & Soon, Complainant asserted that Spring and Soon was masquerading as Y Plus.

In granting the Complainant's Motion to Amend in Spring & Soon I, I stated that I did not need to decide whether Y Plus was in fact a successor to Spring & Soon. I determined that if the Complainant had named Y Plus at the outset of the case, it would have alleged enough information to defeat a motion to dismiss relating to the charges against Y Plus. Spring & Soon I, 7 OCAHO at 973. Thus, I concluded that Complainant had alleged enough information at that point to support adding Y Plus as a respondent. Id. I came to this conclusion because the facts of Spring & Soon suggested strongly that the husband and wife owners of Spring & Soon and Y Plus were engaging in bad faith, not to say fraud, and that the two companies were alter egos.

In Spring & Soon I, Complainant adduced facts showing that Spring & Soon was owned by Chang S. Sung, that Y Plus was owned by his wife Young S. Sung, that Mrs. Sung represented herself to INS officials as an owner of Spring & Soon, and that employees of Y Plus believed Chang S. Sung owned Y Plus. Id. at 970. Moreover, the Motion to Amend was supported by a sworn declaration of an INS agent suggesting that Spring & Soon and Y Plus were owned jointly by Chang S. Sung and Young S. Sung. This apparent continuity of ownership constitutes a critical factual difference between Spring & Soon and the present case.

Indeed, the Complainant's allegation that Spring & Soon was "doing business as" Y Plus suggested that the two companies were in fact one entity, not a predecessor and a successor. Complainant contended that the owners of Spring & Soon were attempting to evade their

responsibilities by disappearing and then commencing operations under a new name. Thus, the amended complaint was not grounded on the theory that the assets of Spring & Soon had been sold to Y Plus–an essential element of successorship–but rather that Spring & Soon was being operated by the same owners under a new name for the purpose of evading its potential liabilities under 8 U.S.C. § 1324a. After I granted the motion to amend, the respondents in Spring & Soon failed to provide any substantial defense to the claim of successor liability. Respondents' failure to answer requests for admissions ultimately led to a judgment on the merits against the respondents. Spring & Soon, 8 OCAHO 1003.

By contrast to Spring & Soon, in the instant case the facts thus far adduced by Complainant support neither the successor liability of Craftsmen nor the hypothesis that Craftsmen is merely WSC's alter ego. As discussed at length previously with respect to successorship, Complainant has failed to allege a transfer of assets between WSC and Craftsmen; moreover, Complainant has failed to adduce facts sufficient to show a continuity of ownership between WSC and Craftsmen. In Spring & Soon, by contrast, Complainant had produced sufficient evidence of continuity of ownership to justify adding Y Plus as a respondent.

Even assuming the veracity of Complainant's assertions for the purpose of adjudicating this Motion to Amend–i.e., that WSC and Craftsmen engage in the same plumbing business (a fact disputed by Craftsmen), that many employees of Craftsmen formerly worked for WSC, that William W. Combe and Carmelita Combe, the owners of Craftsmen, held management positions in WSC, and that WSC and Craftsmen have the same business address–Complainant still has failed to allege continuity of ownership of the sort alleged in Spring & Soon. WSC is alleged to have been owned by the three adult children of William W. Combe and Carmelita Combe. While Complainant alleges that the latter collateralized a line of credit for WSC and were Controller and Office Manager, respectively, of WSC, Complainant does not allege that the parents were owners of WSC, or that the owners of WSC are also owners of Craftsmen.

Spring & Soon and Y Plus were allegedly owned by a husband and wife. The special legal relationship between husband and wife, recognized throughout the law, gives rise to a strong supposition that spouses share an identity of financial interests. Yet no such identity of interests can be imputed between adult children and their parents. As a rule, parents and their adult children do not own property jointly or rely upon each other for financial support to the extent that spouses often do. In this case there is not a scintilla of evidence presented to show that William W. Combe and Carmelita Combe owned any part of WSC, nor is there any allegation or evidence in the record to suggest that the adult children have any ownership stake in Craftsmen.

For all the above reasons, the decisions in Spring & Soon Fashion I and II do not support Complainant's Motion to Amend in this case.

V. SUMMARY AND CONCLUSION

Under the Ninth Circuit rule governing Rule 15(a) Motions, a trial court may deny a motion for leave to amend to add a respondent if the amendment (1) is proffered in bad faith, (2) would unreasonably prejudice the party to be added, or (3) would be futile. A proposed amendment is futile if, after the amendment, the added claim could not survive a motion for summary decision or a motion to dismiss for failure to state claim.

Complainant's proposed amendment in this case could not survive a motion for summary decision or a motion to dismiss for failure to state a claim because Complainant has failed to adduce facts essential to a showing that Craftsmen would be liable for the allegedly unlawful acts committed by WSC. Consequently, Complainant's proposed amendment would be futile, and the Motion for Leave to Amend Complaint must be denied. However, by denying the Motion to Amend at this time, I am not foreclosing Complainant from attempting to amend in the future, if it can meet the necessary prerequisites for adding Craftsmen as a respondent. Therefore, the Motion to Amend is DENIED without prejudice.

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ROBERT L. BARTON, JR.
ADMINISTRATIVE LAW JUDGE

CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of February, 2000, I have served the foregoing Order Denying Complainant's First Motion to Amend Complaint on the following persons at the addresses shown, by first class mail, unless otherwise noted:

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